JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 20/81

BEFORE: The Hon. Mr. Justice Rowe, J.A.
The Hon. Mr. Justice Campbell, J.A. (Ag.)
The Hon. Mr. Justice Wright, J.A. (Ag.)

R. v. SYDNEY WALTERS

Mr. George Soutar for the Applicant

Miss Hyacinth Walker for the Crown

April 1,2 & June 10, 1982

ROWE J.A.

I orally delivered the judgment of the Court on April 2, 1982 but as it was not recorded, at the invitation of Mr. Soutar for the applicant we set out herein the reasons which moved us to dismiss the application for leave to appeal.

Sydney Walters was convicted in the High Court Division of the Gun Court before Theobalds J. sitting without a jury, for the offence of illegal possession of one .38 calibre Special Smith and Wesson revolver and he was given the mandatory sentence of life imprisonment. The facts on which the conviction was founded are all too commonplace. Three members of the Jamaica Constabulary testified that Special Constable Allen took from the right trousers waist of the applicant one .38 revolver which when opened was found to contain 3 live .38 cartridges. This incident occurred on September 24, 1980 at about 6.30 p.m. while it was still daylight in the area of Seven Miles, Bull Bay, in St. Andrew. The defence was that the applicant did not have the firearm in his possession. He saw Special Constable Allen running across a yard and the Special Constable accosted him saying, "Bwoy see the gun yuh friend dem run and leave". He denied having any friend and was held by the police and taken to the police station where the police made futile efforts to coerce

him to acknowledge his possession of the firearm.

The ground of appeal which was argued before us did not touch and concern the facts in the case. It was so framed:-

> "The learned trial judge erred when he deprived the Applicant of his right to make an unsworn statement from the dock and ordered him to give sworn testimony against the Applicant's stated desire."

In support of this ground of appeal an affidavit was filed by the applicant in which he swore in paragraphs 2 - 6 as under:

> "2. That at my trial I was not represented by Counsel.
>
> 3. That at the close of the case for the prosecution I was informed that I could remain silent, swear on the Bible and be cross-examined, or stay where I was and give an unsworn statement.
>
> 4. That I informed the court that I would prefer to stay where I was in the Dock and give an unsworn statement. I wanted to do so because I felt that not having an Attorney-at-law I would not be able to protect myself against any unfair questions.
>
> 5. That I was going to tell the court why I would prefer to stay where I was, but the Learned Judge stopped me and told me to swear to the Bible and make a sworn statement.
>
> 6. That I felt that this was an Order from the Judge and that I had no choice. I did not wish to displease the Judge so I agreed to give sworn testimony and I left where I was and went into the witness box and gave sworn evidence."

This affidavit was referred to the learned trial judge for his comments and he replied:-

> Para. 5. "Totally untrue in relation to any direction from me to the accused to go into the witness box and give a sworn statement. I was completely satisfied that this was what the accused wished to do.
>
> " 6. Since this was not an order from the Judge then the question of the accused not wishing to displease the judge and therefore agreeing to give sworn testimony could not arise."

Counsel who appeared for the prosecution at the trial swore to an affidavit saying that "at no time did the trial Judge stop the accused from saying anything and told him to go into the Box and give sworn evidence." We were referred to the verbatim transcript of the evidence to see what transpired when the Crown closed its case and for completeness we set out the relevant portion:-

"Mr. Sutherland: That is the case for the Crown, M'Lord.

His Lordship: Could you advise the accused of his rights madam Registrar? Tell the accused of his rights, the Crown has closed its case.

Registrar: You have three rights. You can stay there and say nothing; you can come up and be sworn by the Bible; and you can make an unsworn statement. You would not be cross-examined by the Crown Counsel if you go up and make a statement.

Mr. Walters: I would prefer to stay here and make an unsworn statement. I don't ....

His Lordship: You will go and swear to the Bible? You will make a sworn statement?

A: Yes, M'Lord."

Mr. Churchill Neita, an Attorney-at-law had been retained to defend the applicant but on the day of trial he did not appear. The trial nevertheless proceeded in circumstances which this Court considers to be entirely proper and inasmuch as no argument was advanced to us on the hearing of this application to the contrary, we say nothing more about the ground of appeal which was filed complaining that the applicant was put to considerable disadvantage in having to defend himself and causing a great injustice.

The short but very important submission made by Mr. Soutar was that an accused person has the right to make his defence in any way he chooses either by remaining silent, or by giving an unsworn statement, or by giving evidence on oath. He submitted that this right of election is an integral part of the trial and any breach of that right will make the trial a nullity and that would be so irrespective of how the breach came about. Consequently even if the breach might have been as a result of a mis-understanding between the trial judge and the accused and therefore unintentional as where the trial judge did not hear what the accused said, the breach would nevertheless result in the trial being a nullity.

The practice in Jamaica derives from and is co-incident with the practice in England as to the information which should be given to an accused person who is unrepresented as to the options open to him when called upon to make his defence. See Archbold Criminal Pleading, Evidence and Practice, 37th Edition at para. 551. Mr. Soutar makes no complaint at the way the Registrar simplified the options when giving this information to the applicant as to his rights. Later on in the trial the learned trial judge enquired of the applicant if he had witnesses and as to his enquiry there was no complaint.

As the Record stands, so soon as the applicant was apprised of his rights he replied, "I would prefer to stay here and make an unsworn statement." Had he stopped there, no problem could possibly arise. But he did not stop there. He went on speaking and something unfortunate happened. The shorthand writer did not hear all that the applicant then said. He started by saying, "I don't" and his other words were lost to this scribe. On the Record, the further speech is represented simply by some dots. But the experienced trial judge heard and what he heard led him to ask two questions of the applicant. It must be recalled that earlier the learned trial judge had directed the Registrar as is the practice in Jamaica, to advise the applicant of his rights. Now, however, that he discerened that the applicant seemed willing to adopt either

course which would enable him to give his account of what happened, the learned trial judge asked him two questions in his endeavour to be clear as to what the applicant really desired. The fact that the shorthand writer placed the two question marks is indicative that the learned trial judge was not making assertions or giving directions but he was seeking information.

Mr. Soutar did not cite any authority for his proposition that, being an integral part of the trial process, any breach of the right of election which the law confers upon an accused would lead inexorably to a nullification of the trial. We, however, considered a line of cases which began with Crane v. D.P.P. (1921) A.C. 299. There Crane who was indicted for receiving stolen goods knowing them to have been stolen and another man who was charged in a separate indictment for stealing the goods were inadvertently tried together and Crane was convicted. The House of Lords held that the trial was a nullity and Lord Summer is reported as saying at page 331 of the Report:-

> "If so, it must surely follow that his appeal is within the words 'any such appeal in section 4 as there was a miscarriage of justice (for such it is to deprive an accused person of the protection given by essential steps in criminal procedure) the Court was bound to allow his appeal, in the sense of quashing a de facto conviction, which was in law a nullity."

The words in parenthesis in the passage quoted above were relied on by Lord Goddard C.J. in R. v. Neal (1949) 2 All E.R. 438 as an undoubted principle. The point at issue was the effect on the trial where the jury had separated after retirement and before verdict. Lord Goddard said:

> "There is no doubt that to deprive an accused person of the protection given by essential steps in criminal procedure amounts to a miscarriage of justice and leaves the court no option but to quash the conviction."

He gave as his authority for this principle the judgment of Lord Summer in Crane v. D.P.P. supra.

It seems therefore that if the applicant could show that an essential step in the procedure at trial had been breached the trial would be either a nullity or there would be an irregularity leading to a mistrial. An instance of such an irregularity is to be found in the case of R. v. Carter (1960) 44 Cr. App. R. 225. At the trial the Deputy Chairman refused the application for an adjournment which was made on the basis that the accused desired to instruct solicitor and counsel and that the accused was not in a postion to present his case. The trial proceeded and the accused was unrepresented. He was convicted. It was argued on his behalf on appeal that he was forced to attempt to present his defence without having a copy of the depositions, without witnesses whom he desired to call being present, and above all, without his being able to produce a receipt for the purchase of the car which receipt he said was in existence. The prosecution cross-examined the accused on the non-production of the receipt. The style of summing-up adopted by the Deputy Chairman on the question of the receipt, disparaged the defence as it amounted to this, "can you really believe this extra-ordianry story of the accused bout the purchase of the car, especially as there is not a scrap of documentary evidence to support it."

In delivering the opinion of the Court, Lord Parker, Lord Chief Justice said at page 230:-

> "The court feels that although it would be impossible to interfere with the discretion of the Deputy Chairman in refusing to adjourn the case for that reason alone, it became imperative to ensure that this appellant, who was unrepresented had every opportunity of putting forward his defence, calling his witnesses, and for that purpose, the court should have given him every assistance."

Two things were wrong with Carter's trial. Firstly the comments of the Deputy Chairman on his inability to produce documentary evidence were unfair in that the accused said he had the receipt and asked for an opportunity to produce it as he said he had come to court on that day to renew his bail and not to stand trial and so he did not take along

his receipt. Secondly, Carter made it clear that he had witnesses one of whom was actually present in court, his brother-in-law, and yet he was not asked whether he wanted to call his brother-in-law or any other witnesses. Such breaches of the standard procedure led the court to quash the conviction.

In our opinion the factual situation in the instant case does not give rise to any irregularity or to a breach of any of the essential steps in the trial. Mr. Walters had taken a very active part in the trial. He had cross-examined the prosecution witnesses at length. It is obvious from his answer to the two questions posed by the learned trial judge that he fully understood the difference between an unsworn statement from the dock and his giving evidence on oath from the witness box. Of course he now says that he thought the latter course was a direction from the learned trial judge whom he did not wish to displease. In this he is not supported by the Record as it is plain that it is as a result of something that he said why the learned trial judge intervened with the two questions.

It may very well be that the time has come for Parliament to abolish the statement from the dock so that an accused person who wishes to make a defence would in all cases give his evidence on oath.